of private property on land[28] that the reasons which exist against the general abolition of the law of prize are not present in their case. The action proposed is not the product of sentimental altruism, nor is it wholly impracticable, even under the conditions of modern warfare, but is a step toward the goal which has been our aim since 1856.[29]

THE EIGHT HOUR LAW.—The early cases ascribing to Congress in the regulation of interstate commerce powers as absolute and complete as those possessed by an independent sovereignty having in its constitution limitations similar to those contained in the Federal Constitution[1] only half defined the effective scope of Congressional legislation. Not till Congress undertook to act affirmatively[2] and encroached on private rights seeking protection under the limitations of the Fifth Amendment,[3] which prohibits deprivation of life, liberty, or property without due process of law, did the true plenitude of this power appear. To regulate commerce involves the power to foster, to protect, to control, and to restrain,[4] and, of course, Congress has

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[28]Scott, *op. cit.* 557.

[29]See note 13, *supra*. The treaties with Prussia of 1785, 1799, and 1828 are not in point. By Article VII of the Treaty of 1785, which expired of its own force in 1796, if either party engaged in war, free intercourse of the other remaining neutral should not be interrupted, except that by Article XIII contraband might be requisitioned. By Article XXIII, if the parties were at war with each other, merchants were allowed 9 months to settle affairs, "and all merchant and trading vessels . . . shall be allowed to pass free and unmolested." The latter part of Article XXIII of the Treaty of 1785 quoted above was omitted in 1799, and also in the Treaty of 1828, which affirmed Article XII of 1785, and Articles XIII to XXIV inclusive of 1799. 2 Malloy, United States Treaties, 1477, 1480, 1481, 1484, 1486, 1490, 1494, 1496. In reply to a letter of Feb. 10th, 1917, from Minister Ritter, representing the German interests in America, urging that Art. XXIII be enlarged, Secretary Lansing stated that Germany had disregarded these treaties and plainly showed an intention to violate them further, for which reason the United States Government refused to accede to the proposals. In fact Secretary Lansing doubted whether the Treaty of 1821 had not in fact been abrogated. Secretary Lansing to Minister Ritter, March 20th, 1917.

[1]Gibbons *v.* Odgen (1824) 22 U. S. 1, 197. "The wisdom and discretion of Congress . . . are . . . the sole restraints on which they [the people] have relied, to secure them from its abuse." McCulloch *v.* Maryland (1819) 17 U. S. 316, 421.

[2]The power to regulate was first positively and affirmatively employed in 1887. See Willoughby on the Constitution, Vol. II, § 345.

[3]The decision in Munn *v.* Illinois (1876) 94 U. S. 113, furnished a criterion of the probable construction of the Fifth Amendment, in establishing that the Fourteenth Amendment did not afford public businesses greater immunity than they enjoyed under the common law. Allnut *v.* Inglis (1810) 12 East, 527. To the effect that power to regulate businesses affected with a public interest is identical with the police power, see Budd *v.* New York (1892) 143 U. S. 517, 545, 547, 12 Sup. Ct. 468; Chicago, B. & Q. Ry. *v.* Drainage Com'rs. (1906) 200 U. S. 561, 592, 26 Sup. Ct. 341.

[4]See *In re* Debs (1895) 158 U. S. 564, 578, 15 Sup. Ct. 900; Second Employers' Liability Cases (1911) 223 U. S. 1, 47, 32 Sup. Ct. 169.

a broad discretion in the selection of the means to be employed;[5] with this discretion the courts will not interfere where the regulation has a real and substantial connection with interstate commerce,[6] unless the power has been used arbitrarily,[7] or that which is done is in plain violation of the Constitution.[8] Hence, statutes relating to interstate commerce, which tend to render it more secure, reliable, and efficient,[9] have generally been upheld, and a scholastic interpretation of the letter of the Fifth Amendment has not been permitted to obstruct the accomplishment of the public purpose.[10]

In no field has Congressional legislation been more fully developed than in that affecting interstate carriers. Various practices,[11] rates,[12] equipment,[13] and such internal affairs as the hours of service of employees,[14] and the relations of master to servant and of one servant to another,[15] as well as other phases of the carrier's business involving

[5]McCulloch *v.* Maryland, *supra*, at p. 421; McDermitt *v.* Wisconsin (1913) 228 U. S. 115, 128, 33 Sup. Ct. 431; see Adair *v.* United States (1909) 208 U. S. 161, 177, 28 Sup. Ct. 277. The means may have the qualities of police regulations, Hoke *v.* United States (1913) 227 U. S. 308, 323, 33 Sup. Ct. 281, and the extent of regulation depends on the nature and character of the subject, and what is appropriate to its regulation. Lottery Cases (1903) 188 U. S. 321, 23 Sup. Ct. 321; Clark Distilling Co. *v.* Western Md. Ry. (1917) 242 U. S. 311, 37 Sup. Ct. 180.

[6]Second Employers' Liability Cases, *supra*, at p. 49.

[7]Adair *v.* United States, *supra*; see Lottery Cases, *supra*, at p. 362; *cf.* Chicago, M. & St. P. R. R. *v.* Wisconsin (1915) 238 U. S. 491, 35 Sup. Ct. 869.

[8]See Interstate Com. Comm. *v.* Brimson (1894) 154 U. S. 447, 472, 14 Sup. Ct. 1125; McDermitt *v.* Wisconsin, *supra*, at p. 128.

[9]See Second Employers' Liability Cases, *supra*, at p. 48.

[10]Addyston Pipe Co. *v.* United States (1899) 175 U. S. 211, 228, 20 Sup. Ct. 96, the court saying, "We do not assent to the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned"; Baltimore & O. R. R. *v.* Int. Com. Comm. (1911) 221 U. S. 612, 31 Sup. Ct. 621; Johnson *v.* So. Pac. R. R. (1904) 196 U. S. 1, 25 Sup Ct. 158. The same doctrine has been enunciated in cases involving a conflict between state statutes and the provisions of the Fourteenth Amendment. Munn *v.* Illinois, *supra*; German Alliance Ins. Co. *v.* Kansas (1914) 233 U. S. 389, 34 Sup. Ct. 612; see note 3, *supra*.

[11]Act to Regulate Commerce, 24 Stat. 379 (1887). The constitutionality of this Act has never been seriously questioned. See Interstate Com. Comm. *v.* B. & O. R. R. (1891) 145 U. S. 263, 276, 12 Sup. Ct. 844.

[12]34 Stat. 584 (1906); Chicago, R. I. & P. R. R. *v.* Int. Com. Comm. (1910) 218 U. S. 88, 30 Sup. Ct. 651; Louisville & N. R. R. *v.* Int. Com. Comm. (C.C. 1910) 184 Fed. 118.

[13]The Safety Appliance Act, 27 Stat. 531 (1893). See Johnson *v.* So. Pac. R. R., *supra*.

[14]34 Stat. 145 (1907), regulating hours of labor of railroad employees in interstate commerce and requiring reports in regard thereto. See Baltimore & O. R. R. *v.* Int. Com. Comm., *supra*.

[15]36 Stat. 291 (1910), abrogating fellow servant rule, extending carrier's liability to cases of death, and restricting defences of contributory negligence and assumption of risk. See Second Employers' Liability Cases, *supra*.

its contracting power,[16] have been touched by Congressional regulation. Wherever the measure had a real and substantial relation with interstate commerce, neither interference with liberty of contract,[17] nor the fact that it entailed a loss to the carrier, sufficed to render it unconstitutional,[18] and recent cases have carried the doctrine of the subservience of private interests to public needs to a point where the only certain limits which legislation could not transgress seem to be a denial of due process,[19] confiscation of property,[20] or taking of private property for a public use without compensation.[21]

The recent decision of the United States Supreme Court in the case of *Wilson* v. *New* (No. 797, Oct. Term, 1916, decided March 7th, 1917) upholding the Adamson eight hour law,[22] passed for the purpose of averting a nationwide strike, must be regarded as an innovation rather than an extension of the law.[23] Four justices dissented. The act established an eight hour day as a standard of compensation in contracts for labor and service,[24] appointed a commission to observe

[16]New York, N. H. & H. R. R. *v.* Int. Com. Comm. (1906) 200 U. S. 361, 26 Sup. Ct. 272; Adams Express Co. *v.* Croninger (1913) 226 U. S. 491, 33 Sup. Ct. 148; New York, P. & N. R. R. *v.* Peninsula Exchange (1916) 240 U. S. 34, 36 Sup. Ct. 230, discussed in 16 Columbia Law Rev. 343.

[17]Louisville & N. R. R. *v.* Mottley (1911) 219 U. S. 267, 31 Sup. Ct. 265; *cf.* Chicago, B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 31 Sup. Ct. 259; German Alliance Ins. Co. *v.* Kansas, *supra.*

[18]*Cf.* Noble State Bank *v.* Haskell (1911) 219 U. S. 104, 575, 31 Sup. Ct. 186, 299; Clark *v.* Nash (1905) 198 U. S. 361, 25 Sup. Ct. 676.

[19]As the Supreme Court has refused to define due process, preferring to arrive at its meaning by the gradual process of inclusion and exclusion, the term necessarily remains vague. See Senate Reports, Vol. II, 62nd Congress, 2nd Sess. (1912) p. 30 *et seq.* It is impossible to determine from the cases whether it applies equally in all respects to the three departments of government. See McGehee, Due Process, 68 *et seq.* A comparison of the cases of Murray's Lessee *v.* Hoboken (1855) 59 U. S. 272 and Holden *v.* Hardy (1898) 169 U. S. 391, 18 Sup. Ct. 383, illustrates the evolutionary and progressive nature of due process. The most that can be said is that it prohibits unusually prejudicial or arbitrary procedure in any branch of government. As a rule notice and hearing before determination are essential. See Chicago etc. R. R. *v.* Minnesota (1890) 134 U. S. 418, 461, 10 Sup. Ct. 462; Davidson *v.* New Orleans (1877) 96 U. S. 97; McMillen *v.* Anderson (1877) 95 U. S. 37.

[20]Missouri, K. T. R. R. *v.* Int. Com. Comm. (C. C. 1908) 164 Fed. 645, 647; see San Diego Land Co. *v.* National City (1899) 174 U S. 739, 757, 19 Sup. Ct. 804.

[21]Chicago, M. & St. P. R. R. *v.* Wisconsin, *supra,* at p. 501.

[22]39 Stat. 721 (1916).

[23]For divergence of opinions, compare "The Constitutionality of the Eight-Hour Railroad Law," by Malcolm H. Lauchheimer, 16 Columbia Law Rev. 554, and "Due Process and the Adamson Law," by Thomas Reed Powell, 17 Columbia Law Rev. 114.

[24]In this respect § 1 of the Adamson Law is similar to the early state hours of labor statutes defining a day's work but permitting overtime. See Legislative Restriction of Hours of Labor, by John A. Fitch, State of New York, Department of Labor, Bulletin No. 46, March, 1911. Such laws have been generally held constitutional. McCarthy *v.* Mayor etc. of New York (1884) 96 N. Y. 1; Luke *v.* Hotchkiss (1870) 37 Conn. 219. But in Wheeling Bridge & Terminal Co. *v.* Gilmore (1894) 8 Oh.

the operation and effects of the institution of the eight hour standard work day, and fixed the wages to be paid pending the investigation, in most instances involving an increase of wages over what had previously been paid.[25] It is true that the regulation seems to have such a real and substantial relation to interstate commerce that its public purpose might justify an encroachment on the freedom of the carrier,[26] and that, had the Act established the *status quo* in wages pending an investigation, it would have been well within the doctrine of recent cases. However, in placing an increased burden on the carrier pending the investigation provided for in § 2, the Act seems to deprive the carrier of property without due process of law,[27] and in an equitable sense to take its property for a public use without compensation.[28] While the majority opinion expressly disclaimed that an emergency can create powers not otherwise possessed by Congress,[29] it regarded extraordinary circumstances as justifying extraordinary measures, and rested squarely on the ground of a reserve power in Congress sufficient to overcome all obstacles in the way of the free flow of interstate commerce. The decision might have been founded on the power in Congress under all circumstances to fix hours of service or wages, but the court ascribed no such power to Congress.[30]

C. C. R. 658, a statute almost identical with § 1 was held unconstitutional because interpreted to be mandatory as to pay for overtime. The same result was reached where pay for overtime was to be increased by geometrical progression. Low *v.* Rees Printing Co. (1894) 41 Neb. 127, 59 N. W. 362. Since an actual eight hour day is impracticable under present railroad conditions, a law having a tendency to effectuate that result would seem to be within the power of Congress. See Legal Tender Cases (1870) 79 U. S. 457, 543; McLean *v.* Arkansas (1909) 211 U. S. 539, 550, 29 Sup. Ct. 206.

[25]Approximately 85% of the railroads affected had a ten hour day in operation.

[26]See notes 10, *supra,* and 30, *infra.*

[27]This is the sole ground for the dissenting opinion of Justice Day; Justices Pitney and Van Deventer concurred in his dissent; Justice McReynolds did not discuss this point. See note 19, *supra.*

[28]See *per* Justice Day: "Such legislation . . . . amounts to the taking of the property of one and giving it to another . . . . If I am right in the conclusion that this legislation amounted to a deprivation of property without due process of law, no emergency and no consequence, whatever their character, could justify the violation of constitutional rights". The fact that the Interstate Commerce Commission may permit an increase in rates sufficient to reimburse the railroads does not remove this defect inherent in the statute. Chicago, M. & St. P. R. R. *v.* Wisconsin, *supra,* at p. 500. Provision for reimbursement should be made in the statute itself. Gardner *v.* Village of Newburgh (N. Y. 1816) 2 Johns. Ch. *162, *167, *168. It is submitted that there is no analogy between the procedure adopted in the act and so-called test rates, where both sides receive judicial hearings and a binding award is rendered. See Willcox *v.* Consol. Gas Co. (1909) 212 U. S. 19, 50, 51, 29 Sup. Ct. 192.

[29]Citing *Ex parte* Milligan (1866) 71 U. S. 2. *Cf.* Legal Tender Cases *supra,* at p. 540.

[30]That Congress has power to regulate hours of service with a view to the safety of transportation and the welfare of workers is definitely settled. Justices Pitney, Van Deventer and McReynolds seem absolutely to deny Congress the power to fix wages, holding that such a law purports to

Yet it can no longer be doubted that both may be regulated to the full extent necessary for the general welfare of the employees or for the public interest.

The dicta furnish fertile fields for speculation. Apparently the door has been opened for compulsory arbitration of labor disputes in industries affected with a public interest,[31] and though the comment of the court on this subject is expressly limited to public businesses, in view of the vagueness as to what constitutes a business affected with the public interest, the result may be extremely far-reaching.[32] The epochal significance of the decision lies in its accrediting to Congress almost unlimited dynamic reserve power to continue the flow of commerce against all obstacles, including combinations of every sort.[33]

PASSING OF TITLE TO CHATTELS BY UNILATERAL INTENTION.—At early common law title to chattels could not pass, by parol or deed, in gift or sale, without actual manual tradition.[1] Mere intention to pass and to receive title of themselves accomplished nothing. All the modern law on the subject may be described as a continual modifica-

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regulate the relations of common carriers by rail to their employees in respect to a matter—an increase of wages—that has no real or substantial connection with interstate commerce. All the other justices conceded this power to Congress to a certain extent; even Justice Day, dissenting, agreed that Congress had power to fix the amount of compensation necessary to secure a proper service. Justice McKenna concurred with the views of the court as to the power of Congress, but interpreted the Act as distinctly an hours of service law, holding that to regard it as a wage measure would be contrary to the intention of Congress, and would convert expediency for a particular occasion into a rule for all occasions.

[31]See "Constitutional Aspects of Compulsory Arbitration of Industrial Disputes on Public Utilities", by Thomas I. Parkinson, Proceedings of the Academy of Political Science, New Series, No. 1, March, 1917. However, the investigation provided for in § 2 differs essentially from an arbitration, in that no particular hearings are provided for, nor any binding award. Justice Day expressly refused to accredit Congress with power to coerce employees to continue in service or to enact a compulsory arbitration law.

[32]There seem to be no fixed criteria of businesses affected with a public interest. See German Alliance Ins. Co. *v.* Kansas, *supra;* Noble State Bank *v.* Haskell, *supra;* "Business Jurisprudence", by E. A. Adler, 28 Harvard Law Rev. 135. Assuming that the states within their spheres may exercise powers identical with those exercised by the Federal government, the possible extent of this power becomes apparent.

[33]This decision goes farther than any in the past in giving Congress authority to compel a continuance of the flow of commerce. Hitherto this function has been regarded as residing entirely in the enfranchising sovereignty. See the dissenting opinion of Justice Pitney; see also People *v.* N. Y. C. & H. R. R. R. (N. Y. 1883) 28 Hun, 453; Missouri Pac. Ry. *v.* Kansas (1910) 216 U. S. 262, 30 Sup. Ct. 330. The contention of the government in the Tank Car Case, (1916) 242 U. S. 208, 37 Sup. Ct. 95, did not go to the extent of asserting that Congress had delegated to the Interstate Commerce Commission, or even itself possessed, power to keep interstate commerce moving, but only asserted that Congress had delegated to the Commission power, where commerce was in operation, to require certain facilities to be employed. See 17 Columbia Law Rev. 230.

[1]See Cochrane *v.* Moore (1890) 25 Q. B. D. 57, 65, 72. This case contains an excellent historical review of the law on the point.